

FILED

JAN 27 2015

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JIHAD MOHAMMED-BEY,	)	No. C 14-4217 LHK (PR)
)	
Plaintiff,	)	ORDER DENYING PLAINTIFF'S
	)	REQUEST FOR PRELIMINARY
vs.	)	INJUNCTION OR TEMPORARY
	)	RESTRAINING ORDER; ORDER
K. POOL, et al.,	)	OF SERVICE; DIRECTING
	)	DEFENDANTS TO FILE
Defendants.	)	DISPOSITIVE MOTION OR
	)	NOTICE REGARDING SUCH
	)	MOTION

Plaintiff, a California state prisoner proceeding *pro se*, filed this civil rights action under 42 U.S.C. § 1983. Plaintiff has been granted leave to proceed in forma pauperis in a separate order. For the reasons stated below, the court denies plaintiff's request for a preliminary injunction and orders service upon the defendants.

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or

1 seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C.
 2 § 1915A(b)(1), (2). *Pro se* pleadings must, however, be liberally construed. *See Balistreri v.*
 3 *Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988).

4 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
 5 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that
 6 the alleged violation was committed by a person acting under the color of state law. *See West v.*
 7 *Atkins*, 487 U.S. 42, 48 (1988).

8 B. Legal Claims

9 Plaintiff alleges that defendants denied plaintiff's request to change his ethnicity from
 10 "negro," or "black" to "his true nationality of Moorish-American" so that plaintiff could meet
 11 the requirements of his Islamic religion. Plaintiff claims that the change is necessary to abide by
 12 his religious beliefs. Liberally construed, plaintiff states a cognizable claim that defendants
 13 violated plaintiff's right to free exercise of his religion and violated the Religious Land Use and
 14 Institutionalized Persons Act.

15 C. Preliminary Injunction/Temporary Restraining Order

16 Plaintiff moves for a preliminary injunction to prohibit defendants from using plaintiff's
 17 current status of "black" until the conclusion of this federal lawsuit. Federal Rule of Civil
 18 Procedure 65 sets forth the procedure for issuance of a preliminary injunction or temporary
 19 restraining order ("TRO"). However, prior to granting a preliminary injunction, notice to the
 20 adverse party is required. *See* Fed. R. Civ. P. 65(a)(1). Therefore, a motion for preliminary
 21 injunction cannot be decided until the parties to the action are served. *See Zepeda v. INS*, 753
 22 F.2d 719, 727 (9th Cir. 1983). To the extent plaintiff is seeking a TRO, plaintiff has not satisfied
 23 the requirements necessary to grant such relief. *See* Fed. R. Civ. P. 65(b) (stating that a TRO
 24 may be granted without notice to the adverse party or that party's attorney only if: (1) it clearly
 25 appears from specific facts shown by affidavit or by the verified complaint that immediate and
 26 irreparable injury, loss, or damage will result to the movant before the adverse party can be heard
 27 in opposition; and (2) the movant's attorney certifies in writing any efforts made to give notice

and the reasons why it should not be required"). Plaintiff's request for a preliminary injunction or a TRO is DENIED without prejudice.

CONCLUSION

1. Plaintiff's request for a preliminary injunction or a TRO is DENIED without prejudice.

2. The clerk of the court shall mail a Notice of Lawsuit and Request for Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy of the complaint and all attachments thereto (docket no. 1), and a copy of this order to **Appeals Examiner K. Pool, Captain J.A. Zamora, Chief S.P. Albritten, CCII V. Wiggins, CCI T. Blanson, AW K. Mitchell, and CCRM S. Pangelinan at San Quentin State Prison**. The clerk of the court shall also mail a courtesy copy of the complaint and a copy of this order to the California Attorney General's Office. Additionally, the clerk shall mail a copy of this order to plaintiff.

3. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure requires them to cooperate in saving unnecessary costs of service of the summons and complaint. Pursuant to Rule 4, if defendants, after being notified of this action and asked by the court, on behalf of plaintiff, to waive service of the summons, fail to do so, they will be required to bear the cost of such service unless good cause be shown for their failure to sign and return the waiver form. If service is waived, this action will proceed as if defendants had been served on the date that the waiver is filed, and defendants will not be required to serve and file an answer before sixty (60) days from the date on which the request for waiver was sent. Defendants are asked to read the statement set forth at the bottom of the waiver form that more completely describes the duties of the parties with regard to waiver of service of the summons. If service is waived after the date provided in the Notice but before defendants have been personally served, the Answer shall be due sixty (60) days from the date on which the request for waiver was sent or twenty (20) days from the date the waiver form is filed, whichever is later.

4. No later than **sixty (60) days** from the date the waivers are sent from the court, defendants shall file a motion for summary judgment or other dispositive motion with respect to

1 the cognizable claims in the complaint.

2 Any motion for summary judgment shall be supported by adequate factual documentation
3 and shall conform in all respects to Rule 56 of the Federal Rules of Civil Procedure. **Defendants**
4 **are advised that summary judgment cannot be granted, nor qualified immunity found, if**
5 **material facts are in dispute. If defendants are of the opinion that this case cannot be**
6 **resolved by summary judgment, they shall so inform the court prior to the date the**
7 **summary judgment motion is due.**

8 5. Plaintiff's opposition to the dispositive motion shall be filed with the court and
9 served on defendants no later than **twenty-eight (28) days** from the date defendants' motion is
10 filed. Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and
11 *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment must
12 come forward with evidence showing triable issues of material fact on every essential element of
13 his claim).

14 6. Defendants shall file a reply brief no later than **fourteen (14) days** after plaintiff's
15 opposition is filed.

16 7. The motion shall be deemed submitted as of the date the reply brief is due. No
17 hearing will be held on the motion unless the court so orders at a later date.

18 8. All communications by the plaintiff with the court must be served on defendants
19 or defendants' counsel, by mailing a true copy of the document to defendants or defendants'
20 counsel.

21 9. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
22 No further court order is required before the parties may conduct discovery.

23 10. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the court
24 and all parties informed of any change of address and must comply with the court's orders in a
25 timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
26 pursuant to Federal Rule of Civil Procedure 41(b).

27 ///

28 Order Denying Plaintiff's Request for Preliminary Injunction or Temporary Restraining Order; Order of Service;
Directing Defendants to File Dispositive Motion or Notice Regarding Such Motion
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1 IT IS SO ORDERED.

2 DATED: 1/26/15

Lucy H. Koh

3 LUCY H. KOH
United States District Judge